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Commercial fraud: ongoing and possible future work

Note by the Secretariat*

1. The Commission may wish to recall its consideration of the subject of commercial fraud at its thirty-fifth to thirty-eighth sessions, from 2002 to 2005.[1]

2. At its thirty-fifth session in 2002, the Commission heard that fraudulent practices of an international character had a significant adverse economic impact on world commerce and regularly affected legitimate commercial institutions. It was also observed that fraudulent practices that affected international commerce had not been sufficiently addressed by international bodies, particularly with respect to their commercial aspects. The view was expressed that the Commission combined a governmental perspective with an internationally recognized expertise in international commerce and a tradition of collaboration with other international organizations, and that the Commission was well positioned to consider the phenomenon of commercial fraud. Although reservations were expressed regarding the scope of any project in this area, especially in light of limited resources, it was decided that the Secretariat should prepare a study of commercial fraud for the Commission to consider whether further work was appropriate and feasible.[2]

3. In order to assess the extent and implications of commercial fraud and consider possible recommendations regarding future action, in December 2002, the Secretariat convened a meeting of experts who regularly encounter and combat commercial fraud and who represented different regions, perspectives, and disciplines. Following from that meeting, the Secretariat prepared and issued a note on possible future work relating to commercial fraud (A/CN.9/540) as requested by the Commission at its thirty-fifth session. The note concluded that available evidence suggested that commercial fraud constituted a serious and potentially increasing threat to international commerce. The note also considered factors in

* The late submission of the document reflects the requirement for consultation with the United Nations Office on Drugs and Crime (UNODC).

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defining or describing commercial fraud, concluding that a precise definition was not currently feasible but that it would be useful to identify and detail common patterns of fraudulent commercial conduct. Finally, the note also suggested that there was an important independent commercial dimension to commercial fraud in addition to that of criminal law enforcement, and made several recommendations to the Commission in regard to future work.

4. At its thirty-sixth session in 2003, the Commission considered the note of the Secretariat (A/CN.9/540). It agreed with the recommendation that an international colloquium should be organized to permit an exchange of views from various interested parties, including those working in national Governments, intergovernmental organizations and relevant private organizations on the private law aspects of commercial fraud. It was also noted that the colloquium would provide an opportunity to promote an exchange of views with the criminal law and regulatory sectors that combat commercial fraud and to identify matters that could be coordinated or harmonized. In addition, the Commission considered that it would be useful for a study to be conducted by the Commission on Crime Prevention and Criminal Justice (the United Nations Crime Commission) through the Centre for International Crime Prevention of the United Nations Office on Drugs and Crime (UNODC), in consultation with the UNCITRAL Secretariat.[3]

5. A colloquium on international commercial fraud was held in Vienna from 14 to 16 April 2004. The speakers, panellists, and participants at the colloquium consisted of experts from each of the several practice areas examined, representing as broad a spectrum of approaches to the problem of commercial fraud as possible, and included approximately 120 participants from 30 countries. It was agreed at the colloquium that any doubts had been dispelled as to the widespread existence of commercial fraud and its significant worldwide impact, regardless of a country's economic development or system of government. It was also agreed that education and training played significant roles in fraud prevention and that it might be particularly useful to identify common warning signs and indicators of commercial fraud. It was further agreed at the colloquium that local cooperative efforts between law enforcement bodies and the private sector seemed particularly effective and should be encouraged. While some progress was made towards fashioning a description of commercial fraud, it was generally thought that additional work would be necessary to formulate a definition, characterization or precise description. In particular, it was suggested that serious consideration should be given to developing a means of gathering and publicizing statistics and information about commercial fraud and that public information about types of fraud, typical patterns, and links to other sources of information would be of considerable value in the fight against commercial fraud (see A/CN.9/555, paras. 3, 4, 25-28, and 62-71).

6. At its thirty-seventh session in 2004, the Commission considered the report of the Secretariat on the colloquium (A/CN.9/555), and agreed that the Secretariat should facilitate, whenever appropriate, the discussion of examples of commercial fraud in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations. In addition, with a view towards education, training, and prevention, the Commission agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of fraud

to the extent such lists would help potential targets protect themselves and avoid becoming victims of fraudulent schemes. Further, it was thought that national and international organizations interested in fighting commercial fraud could be invited to circulate such material among their members in order to help test and improve those lists. While it was not proposed that the Commission itself or its intergovernmental working groups be directly involved in that activity, it was agreed that the Secretariat should consider preparing, in close consultation with experts, such materials listing common features present in typical fraudulent schemes and that the Secretariat would keep the Commission informed of progress in this regard.[4]

7. At its thirty-eighth session in 2005, the Commission's attention was drawn to resolution 2004/26 adopted by the Economic and Social Council (ECOSOC) on 21 July 2004, entitled "International cooperation in the prevention, investigation, prosecution and punishment of fraud, the criminal misuse and falsification of identity and related crimes". That resolution envisaged the convening of an intergovernmental expert group to prepare a study on fraud and the criminal misuse and falsification of identity, and to develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL. The resolution also recommended that the Secretary-General designate UNODC to serve as secretariat for the intergovernmental expert group, in consultation with the Secretariat of UNCITRAL.[5]

8. Also at its thirty-eighth session, the Commission heard that UNODC organized an intergovernmental expert group meeting from 17 to 18 March 2005, and that the results of the meeting had been reported to the Commission on Crime Prevention and Criminal Justice at its fourteenth session (Vienna, 23-27 May 2005; see E/CN.15/2005/11). The Commission was advised that participants at that meeting had indicated that fraud was a serious concern for their Governments and represented a problem that was rapidly expanding, both in the range of frauds being committed and their geographical scope and diversity, owing in part to developments in technology. Participants had agreed that a study of the problem should be undertaken, based on information received from Member States of the United Nations Crime Commission in response to a questionnaire on fraud and the criminal misuse and falsification of identity to be circulated by UNODC. The Commission was also informed that the UNCITRAL Secretariat had participated in the expert group meeting and the Commission expressed its support for the assistance of the UNCITRAL Secretariat in the UNODC project.[6]

I. UNCITRAL work on common features present in typical fraudulent schemes

9. In light of the suggestion of the Commission at its thirty-seventh session to consider the preparation of lists of common features present in typical fraudulent schemes, the Secretariat held a meeting of experts on commercial fraud from 12-14 October 2005 to consider issues related to the formulation of a list of such common features, including the character and content of the list, and its optimal use in education and training, with a view to the prevention of commercial fraud.

10. Pending the Commission's ultimate consideration and approval of the materials for dissemination, it was thought that the intended purposes of the project were threefold:

(a) To formulate materials that would identify patterns and characteristics of commercial fraud in a manner that would encourage the private sector to mobilize its resources to combat commercial fraud in an organized and systematic manner;

(b) To assist governmental bodies in understanding how they might help the public and private sector to address the problem of commercial fraud; and

(c) To assist the criminal law sector in understanding how best to engage the private sector in the battle against commercial fraud.

11. It was emphasized in the meeting of experts that the overall objective of the project was to create an easily accessible and understood document that would set out indicators to assist in the exposure of behaviour that could constitute commercial fraud, so that it would lend itself to fraud prevention via widespread circulation. It was thought that the intended audience for the materials could include business persons, individuals, regulators, professionals, law enforcement officers, civil and criminal litigants, and potentially courts in civil and criminal cases involving commercial fraud. It was highlighted that the nature of the materials or document envisioned was not a legislative text nor a legal text, but rather that it would fall into the category of materials that contained useful guidance and reference materials for users.

12. While it was recognized that a definition of commercial fraud would be desirable for the purposes of identifying that activity, it was emphasized that a descriptive definition, rather than a strictly legal definition, was more appropriate in light of the objectives and the intended breadth of the project, and to ensure its flexibility. Discussions are continuing regarding the required elements of that description so as to render it appropriate in all legal systems, but it is thought that the following elements should be reflected in any definition of commercial fraud:

(a) An element of deceit or inaccurate information;

(b) An economic dimension and scale;

(c) The use or misuse and compromise or distortion of commercial systems with the potential of international impact; and

(d) A loss of value.

13. It was suggested that the indicators or common features should be prefaced by an introduction or commentary, which could state the purpose of the materials and their intended target audience, which could explicitly include both developed and developing countries, as well as setting out information on the background and methodology of the project. The materials themselves could consist of the discrete treatment of a number of different indicators or characteristics of commercial fraud, but each of the indicators taken alone would not be understood to definitely indicate the presence of commercial fraud. Instead, the presence of a single indicator would send a signal that commercial fraud was a possibility, while the presence of several of the indicators would heighten that concern. A brief description would follow the identification of each indicator, which would then be followed by more detailed descriptions and examples in order to further identify the various nuances of

behaviour and form intended to be included. The examples would be drawn from various different areas of legal practice, and would include various types of victims, in order to demonstrate that they are intended for universal application in a commercial context. It was agreed that it would be useful to provide advice, warnings, or recommendations for each type of indicator, as appropriate, and that, since many of the indicators may or should overlap, cross references to other related indicators should be included.

14. It was suggested that a viable format for the preparation of common features of fraudulent schemes might be the following:

(a) A simple name by which the topic could be known and identified;

(b) A brief description accompanied by specific examples of the type of behaviour included;

(c) A more detailed explanation of each aspect of the behaviour;

(d) Warnings, advice, or recommendations; and

(e) Cross-references to related topics.

15. Various topics were also considered appropriate for treatment along the lines of the approach outlined in the paragraph above. While it was recognized that continued work on the indicators was likely to unearth other topics worthy of treatment, a preliminary list of topics could include the following:

(a) Irregular documents;

(b) Misuse of names;

(c) Misuse of technical terms;

(d) Frustration of due diligence;

(e) Disproportionate returns;

(f) Questionable or unknown source of repayment;

(g) Overly complex transactions;

(h) Fraud based on personal affinity or relationships;

(i) Undue secrecy;

(j) Over- or under-qualified employees;

(k) Certain employee incentives;

(l) Inconsistencies in transactions;

(m) Irrational or illogical aspects;

(n) Undue influence or inducements;

(o) Inappropriate request for information disclosure;

(p) Fraud perpetrated in the course of an insolvency;

(q) Misuse of motives; and

(r) Ensnarement.

16. It was also suggested that explanatory appendices to the materials could be helpful to future users. While caution was expressed regarding available resources to prepare or maintain such appendices, it was thought that the following suggestions could be considered for inclusion as appendices:

(a) A glossary of commonly-used terms, covering terms that are exclusively used in frauds and terms that have legitimate uses as well as fraudulent ones;

(b) An explanation of how to effectively perform due diligence in order to prevent being a victim of commercial fraud;

(c) Links to or a list of the URLs of legitimate websites posting warnings and information about commercial fraud;

(d) A database of fraudulent transactions that have been encountered in the past from countries around the world;

(e) A database of profiles of victims of commercial fraud; and

(f) A quiz or checklist to assist organizations or individuals in understanding whether they may be at risk.

II. UNODC fraud study

17. The progress of the work on the study on fraud and the criminal misuse and falsification of identity has been reported by UNODC to the United Nations Crime Commission at its fifteenth session (Vienna, 24-28 April 2006; see E/CN.15/2006/11).

18. As reported in that document, at its meeting in March 2005, the intergovernmental expert group agreed that the study should consider information and materials provided by the experts themselves, data available from governmental sources, including relevant and appropriate policy, legislative, research and other materials, and, where relevant and feasible, information from commercial and other intergovernmental or non-governmental sources. It was agreed that a questionnaire in two basic parts, one dealing with fraud and the other with identity fraud, should be prepared and disseminated by the UNODC secretariat to Member States of the United Nations Crime Commission to obtain information on fraud and the criminal misuse and falsification of identity.

19. The questionnaire, as amended and finalized, was attached to a note verbale dated 15 September 2005 and disseminated by the UNODC secretariat to Member States of the United Nations Crime Commission, and to the experts who had attended the meeting of the intergovernmental expert group for their consideration, with a view to their submitting to the group data, observations or conclusions in specific subject areas of the study.

20. The UNCITRAL Secretariat worked with the UNODC secretariat in the drafting of the questionnaire, and in October of 2005, with a view to collecting information from commercial and other private-sector sources, disseminated the questionnaire to the governmental and non-governmental organizations and other non-State invitees to the Commission sessions, as well as to leading corporations in various industries throughout the world, that were thought to have an interest in

either responding directly to the questionnaire, or in forwarding the questionnaire to its membership for response.

21. The UNODC secretariat has reported that it will proceed with the drafting of the study in due course in conjunction with its intergovernmental expert group. It is anticipated that the final substantive report will be submitted to the United Nations Crime Commission at its sixteenth session in 2007, and may also be submitted to the Commission for consideration at a future session.

III. Proposal for future work

22. The Commission may wish to request that:

(a) The Secretariat continue its work in conjunction with experts and other interested organizations with respect to identifying the common features of fraudulent schemes, with a view to presenting interim or final materials for the consideration of the Commission at a future session; and

(b) The Secretariat continue to assist and cooperate with UNODC in its study on fraud and on criminal misuse and falsification of identity, and that it keep the Commission informed of the progress of that work.

Notes

[1] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290; ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 231-241; ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 108-112, and ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 216-220.

[2] Ibid., *Fifty-seventh Session, Supplement No. 17* and corrigendum (A/57/17 and Corr.3), paras. 279-290.

[3] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 240-241.

[4] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 110-112.

[5] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 217.

[6] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 218-219.